STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFAEL D. HONIG,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITY

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C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Rafael D. Honig, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Honig was convicted after a jury found him guilty of two counts of first-degree sexual assault of a child (15:1; 16:1; 22:1; A-Ap. 101). The victims were his granddaughters, three-year-old Y.C. and five-year-old Y.H. (2:1-2).[1]

Honig argues on appeal that his trial lawyer was ineffective for failing to call a defense witness, George Colon, "whose testimony would have closed important gaps in the theory of defense," Honig's brief at 9, for failing to impeach Y.C.'s trial testimony with inconsistent statements in her recorded forensic interview, and for failing to object to references in Y.H.'s recorded forensic interview to statements that Honig sexually

[1]Honig states that Y.H. and Y.C. were six and four years old, respectively. *See* Honig's brief at 2. Those were the girls' ages at the time of trial (52:13, 68). The complaint and information alleged that the offenses happened before they turned six and four (2:1-2; 5:1), and Y.H. testified that she was five years old when Honig assaulted her (52:26).

abused her cousins.[2] Because the circuit court correctly decided that Honig is not entitled to relief on any of those claims, this court should affirm the judgment of conviction and the order denying postconviction relief.

I. APPLICABLE LEGAL STANDARDS.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

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[2]Honig's postconviction motion also alleged that trial counsel was ineffective for failing to object to Y.C.'s testimony because she did not take an oath or promise to testify truthfully (34:10-13). He does not raise that issue on appeal. *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

In *Harrington v. Richter*, 562 U.S. 86 (2011), the Supreme Court emphasized that "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Id.* at 105 (quoted source omitted). With respect to the deficient performance prong of the *Strickland* test, the Court explained:

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Id. (citations omitted).

To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693; *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Strickland*, 466 U.S. at 693. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The Supreme Court has explained the demanding standard a defendant must meet to establish prejudice under *Strickland*:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *The likelihood of a different result must be substantial, not just conceivable.*

Harrington, 562 U.S. at 111-12 (citations omitted; emphasis added).

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

II. HONIG'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

A. Honig's theory of defense was not, as he claims, that Raymond Cruz made up the allegations and coached the victims.

Before responding to Honig's specific claims of ineffective assistance, the State will address an assertion that runs through his appellate brief and that is the foundation of two of his claims: that "[t]he theory of defense was that Raymond [Cruz] made up the allegations and coached the girls." Honig's brief at 24; *see also id*. at 11, 14, 23. The record demonstrates that that was not the theory of defense, as Honig's counsel did not raise that theory in his opening statement or in his closing argument.

In his opening statement, defense counsel told the jury that he anticipated that the girls' mother would testify that Cruz told her that Y.H. told him about the "terrible things" that Honig did to Y.H. (51:25-26). Counsel told the jury that they would see that Cruz has "a clear bias" and "bad feelings toward" Honig. He noted that Cruz was alone when Y.H. disclosed the abuse to him, that Cruz then had Y.H. repeat what she told him to her mother's boyfriend, and that Cruz had told detectives that he had noted that Y.H.'s behavior had changed over the previous few days (51:27).

Nothing in the opening statement suggested to the jury that the theory of defense was that Cruz made up the allegations and coached the girls. Defense counsel told the jury that the evidence would show that Cruz was biased against

Honig, not that Cruz invented the allegations and coached the girls.

In his closing argument, defense counsel made it explicit that the theory of defense was not that Cruz put the girls up to it. Counsel said, "We get to Raymond Cruz, and I'm not even trying to insinuate that he, you know, made up this story to get the girls to say to, you know, get Rafael [Honig] locked up, but, you know, he does have a credibility problem" (53:59). Defense counsel, who had called Cruz as a witness, told the jury that "I didn't get him up here to testify that, 'Yeah, I told the girls this,' or 'I put this idea in their heads,' or 'Rafael didn't do it'" (*id.*). He called Cruz to testify, he said, to allow the jury to see who Cruz was (*id.*).

At the *Machner* hearing, defense counsel agreed with postconviction counsel that the theory of defense "was that the allegations were untrue and that the children were not telling the truth about what happened" (56:6; A-Ap. 108). Postconviction counsel then asked, "And part of that theory of defense was that Raymond, the uncle, would have come up with the allegations himself and coached the girls through it?" (*id.*). Trial counsel responded, "Either that or that another person known to the family had abused the children and perhaps then it got twisted around to the point where it was Mr. Honig who was the one that had been accused -- or was essentially blamed for it" (*id.*).

That answer did not confirm that the theory of the defense was that the allegations were Cruz's doing. In a follow-up question, postconviction counsel asked trial counsel whether he remembered, "in opening statements, indicating

that the theory was that Raymond [Cruz] came up with the allegations" (*id.*). Trial counsel began to answer – he said, "I believe" – when postconviction counsel interjected: "The bias against Mr. Honig?" (*id.*). Trial counsel answered that he recalled saying that (*id.*).

Trial counsel was correct; he did bring up Cruz's bias in his opening statement (51:27). But he never suggested that Cruz invented the allegations or coached the victims (51:24-28).

There was no evidence adduced at trial that would have supported a claim that Cruz was responsible for the girls' accusations. Y.H. testified on direct examination that Cruz was the first adult she talked to about what Honig had done (52:30). She testified that Cruz was working on the porch of her new house when she told him what had happened (52:42).

On cross-examination, defense counsel asked her whether Cruz ever told her to lie; she answered, "No" (52:38). Defense counsel asked if Cruz ever told her to say that her grandfather did bad things to her; she answered, "I don't remember" (52:38-39). Defense counsel then referred to Y.H.'s testimony that Honig "always touches little girls in the private" and asked her whether that was "something that Raymond [Cruz] or somebody else said?" (52:40). Y.H. answered, "No" (*id.*).

When Y.C. testified, defense counsel asked her if Cruz had told her "anything about your grandpa, your abuelo, about things that he maybe did? Do you remember Raymond telling you anything about your abuelo?" (52:81). Y.C. answered, "No" (*id.*).

When Cruz, called as a defense witness, testified, defense counsel asked him if he ever told Y.H. or Y.C. "to say anything about bad things that grandpa did?" (52:119). Cruz answered, "No, sir. There was actually no reason to. Why would I?" (*id.*).

Against that factual background, the State will address Honig's claims that he received ineffective assistance from his trial lawyer.

B. Trial counsel was not ineffective for failing to call George Colon as a witness.

1. Counsel had a valid strategic reason for not calling Colon.

When addressing Honig's contention that his trial counsel performed deficiently, this court "start[s] with the proposition that strategic decisions by a lawyer are virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919 (citing *Strickland,* 466 U.S. at 690); *see also State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620 (holding that the trial court's determination that counsel had a reasonable trial strategy "is virtually unassailable in an ineffective assistance of counsel analysis"). The circuit court found that trial counsel did not call Colon as a witness for a valid strategic reason: that counsel perceived Colon to be uncooperative (56:42-43; A-Ap. 144-45).

Honig argues that this court should not defer to this finding of fact because it is clearly

erroneous. *See* Honig's brief at 12-13 and n.7. The State disagrees.

Under the clearly erroneous standard, a factual finding will be overturned only if it is contrary to the great weight and clear preponderance of the evidence. *See State v. Martwick*, 2000 WI 5, ¶18 n.8, 231 Wis. 2d 801, 604 N.W.2d 552; *see also United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir. 1993) ("We overturn a district court's factual finding only if that finding is clearly erroneous or, put another way, only if that finding 'strike[s] us as wrong with the force of a five-week old, unrefrigerated dead fish.'") "It is for the trial court, not the appellate court, to resolve conflicts in the testimony." *Global Steel Products Corp. v. Ecklund,* 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417.

At the *Machner* hearing, trial counsel was asked on cross-examination why he decided not to call Colon as a witness (56:12; A-Ap. 114). Counsel responded:

> I had some conversations with Mr. Colon. He had in fact brought over trial clothes for Mr. Honig some time prior to the trial. And then on the phone with him he had mentioned something about either being out of state or having surgery or both. After the first day of trial, it seemed to me that he was uncooperative and didn't want to testify. I don't recall that's exactly why I didn't call him or try to call him, but --

(56:12; A-Ap. 114.)

Trial counsel's explanation was not a model of clarity. But given his statement that "it seemed to me that he was uncooperative and didn't want to testify" (*id.*), it was not clearly erroneous for the circuit court to find that trial counsel had a strategic reason – his perception that Colon was uncooperative – for not calling Colon to testify.

Honig complains that trial counsel "gave no reason why he would have thought that George [Colon] was uncooperative." Honig's brief at 13. But it is Honig's burden to prove that trial counsel was ineffective, *see Strickland*, 466 U.S. at 687, and to elicit the relevant testimony at the *Machner* hearing. *See State v. Machner,* 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). He cannot complain that trial counsel gave no reason for believing that Colon would be uncooperative when he never asked that question of trial counsel (56:4-14; A-Ap. 106-16).

2. Colon's testimony would not have been admissible.

There is another reason why Honig cannot demonstrate deficient performance. Trial counsel does not perform deficiently by failing to seek the admission of inadmissible evidence. *See State v. Wirts*, 176 Wis. 2d 174, 181, 500 N.W.2d 317 (Ct. App. 1993). Honig has not shown that Colon's testimony would have been admissible.

Honig argues that Colon's testimony would have been admissible on either of two grounds. This is how he describes the first of those grounds:

> First, George's testimony was admissible as specific evidence of a witness' character for

> untruthfulness. Wis. Stat. § 906.08(1) and (2). Specific instances of untruthfulness may be proven by extrinsic evidence unless the issue is collateral. Bias is never collateral and extrinsic evidence may be used.

Honig's brief at 13 (citing *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978), *abrogated on other grounds by Manson v. State,* 101 Wis. 2d 413, 304 N.W.2d 729 (1981), and Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 Marq. L. Rev. 283, 290 n.19 (1989)).

Honig's contention that "[s]pecific instances of untruthfulness may be proven by extrinsic evidence unless the issue is collateral" is wrong. Wisconsin Stat. § 906.08 provides in relevant part:

> **(1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2) [the "Rape Shield" statute], the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of

> truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Wis. Stat. § 906.08(1), (2).

The evidence at issue here is Colon's testimony that Cruz told him that Cruz knew how to get rid of people he disliked, like drug dealers, by "using children to make accusations against adults" or by planting a gun on a felon (56:20, 26-27; A-Ap. 122, 128-29). Section 906.08(1) does not provide a basis for admitting that evidence because it is not "evidence in the form of reputation or opinion." Wis. Stat. § 906.08(1); *see State v. Cuyler*, 110 Wis. 2d 133, 138, 327 N.W.2d 662 (1983) (Section 906.08(1) permits a witness "to testify to his or her personal opinion about the defendant's character for truthfulness or to the reputation of the defendant in the community for truthfulness or untruthfulness or to both personal opinion and reputation.").

Nor does Wis. Stat. § 906.08(2) provide a basis for admitting that evidence. That subsection provides as a general rule that evidence of "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility . . . may not be proved by extrinsic evidence." The exception to that rule is that specific instances of the conduct of a witness, "if probative of truthfulness or untruthfulness and not remote in time," may "be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness." Wis. Stat. § 906.08(2). Section 906.08(2), in other

words, "permits the use of specific instances of conduct of a witness for the purpose of attacking the credibility *on cross examination of the witness himself*." *McClelland v. State*, 84 Wis. 2d 145, 155, 267 N.W.2d 843 (1978) (emphasis added). Section 908.08(2) would not have permitted *Colon* to testify about specific instances of *Cruz*'s conduct to demonstrate Cruz's character for untruthfulness.

Honig is correct that "[t]he bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." *Williamson*, 84 Wis. 2d at 383. But Colon's testimony that Cruz said that Cruz knew how get rid of people by "using children to make accusations against adults" or by planting a gun on a felon (56:20, 26-27; A-Ap. 122, 128-29), is not evidence of Cruz's bias or prejudice toward Honig – it says nothing at all about Cruz's feelings toward Honig.

Honig alternatively argues that "had counsel asked [Cruz] about his statement to give him a chance to explain or deny it–and had he denied it–[Colon's] testimony would have been admissible as a prior inconsistent statement." Honig's brief at 14. The State agrees. *See* Wis. Stat. §§ 906.13(2)(a)1, 908.01(4)(a)1; Blinka, *supra*, at 290 n.19 ("Section 906.13 contemplates the use of extrinsic evidence to prove that the witness has made a prior inconsistent statement."). But that gets Honig nowhere, because trial counsel did not ask Cruz about his statement to Colon (52:113-21), nor did the prosecutor (52:122-24). Absent a denial by Cruz, Colon's testimony would not have presented a prior inconsistent statement.

Honig does not argue on appeal – and, more importantly, he did he not argue in his postconviction motion (34:1-19; 37:1-7; 40:1-3) – that defense counsel was ineffective for failing to ask Cruz about Cruz's statement to Colon. As the circuit court pointed out, if trial counsel "had already made the decision that Mr. Colon was not likely to be a helpful witness to Mr. Honig after all, then why would he ask the predicate question?" (56:44; A-Ap. 146).) Because defense counsel did not ask Cruz the predicate question, Colon's testimony would not have been admissible as a prior inconsistent statement but would have been inadmissible hearsay. *See* Wis. Stat. §§ 908.01(4)(a)1, 908.02.

Honig has not shown that Colon's testimony would have been admissible at trial. Defense counsel did not perform deficiently by failing to seek to admit inadmissible evidence. *See Wirts*, 176 Wis. 2d at 181.

3. Honig has not shown that he was prejudiced.

Honig argues that he was prejudiced by the failure to introduce Colon's testimony because that testimony "was crucial to the theory of defense." Honig's brief at 14. He notes that the jury heard that Cruz was alone with Y.H. when she disclosed the abuse and that the jury knew that Cruz and Honig "fought" shortly before the allegations surfaced.[3] *Id*. But, he contends, "the jury did not hear any evidence to suggest that [Cruz] was the type of person who would go so far as to frame someone he disliked with a serious crime." *Id*.

[3]There was no evidence of any physical altercation between Cruz and Honig.

That argument is flawed because, as discussed in the first section of this brief, the theory of defense was not that Cruz framed Honig. *See supra*, pp. 6-8. Nor was there any evidence that Cruz persuaded the girls to falsely accuse Honig of sexual assault. *See supra*, pp. 8-9. To the contrary, Y.H. testified that Cruz never told her to lie and that her description of what Honig did was not "something that Raymond [Cruz] or somebody else said" (52:38, 40). Y.C. similarly testified that Cruz had not told her anything about what Honig did to her (52:81).

And there is another "missing piece in the defense theory," Honig's brief at 14, that Colon's testimony would not supply. Why would the girls falsely accuse their grandfather of sexually assaulting them? Y.H. testified that she did not like Honig, but that was because of what he did – "[h]e touches little girls in their privates" (52:40-41). Without any explanation why the girls would have agreed to repeat lies planted by Cruz, it is highly unlikely that Colon's testimony would have raised a reasonable doubt in the jurors' minds about whether the girls were telling the truth.

C. Trial counsel was not ineffective for failing to seek redaction of portions of Y.H.'s forensic interview.

Honig next argues that his lawyer was ineffective for failing to seek redaction of the portions of Y.H.'s recorded forensic interview in which she said that Honig did the same things to two of her cousins that he did to her and Y.C. He also asserts that counsel was ineffective for failing

to seek a limiting instruction with regard to those statements.

Because the postconviction court said that it likely would have granted a motion in limine had one been brought (56:47; A-Ap. 149), the State will assume that counsel performed deficiently. Honig's claim fails, however, because he cannot demonstrate prejudice.

Judge Brostrom, who had presided at trial, explained why she concluded that Honig was not prejudiced:

> It is true [trial counsel] could have brought a motion in limine to try to exclude the very brief reference in the older girl's forensic video pertaining to her little cousins. Certainly that wasn't a great little bit that came in in the trial, but in the balance of all of the evidence, I certainly don't think that it made any difference in the outcome of the trial. It was a very brief reference that, you know, was not developed in any way. There was no additional questioning about it. There was no argument about it.
>
> So, could he have brought that motion in limine? Yes. The Court would have likely granted it. But in the totality of all of the evidence and the credibility determination that had to be made, I don't think that it would have resulted in a different outcome.

(56:47-48; A-Ap. 149-50.)

Honig does not challenge the circuit court's findings that Y.H.'s recorded statements about her cousins involved "a very brief reference that . . . was not developed in any way," that "[t]here was no additional questioning about it, and that "[t]here was no argument about it." An appellant's failure to refute the grounds of the trial court's

ruling is a concession of the validity of those grounds. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994)

Instead, he argues that the jury was "likely surprised and shocked" by Y.H.'s statements about her cousins and that the jury "would have been concerned and alarmed for the cousins and may have detoured during their deliberations to wonder about the cousins and whether Mr. Honig had 'gotten away' with other assaults." Honig's brief at 16.

"A showing of prejudice requires more than speculation." *Wirts*, 176 Wis. 2d at 187. "The '*Strickland* Court [placed] the burden on the defendant to *affirmatively* prove prejudice.'" *Id.* (quoted source omitted). Honig's speculation that the jury may have been distracted during deliberations by concerns about the cousins is pure speculation.

More importantly, because the statements about the cousins came from Y.H. and only Y.H., the jurors would have found those statements worthy of consideration only if they found Y.H. credible. And if they found Y.H. credible, the fact that she said that Honig also did to her cousins what he did to her and to Y.C. would not have affected the jury's determination whether Honig sexually assaulted Y.H. and Y.C. Honig was not prejudiced, therefore, by trial counsel's failure to seek redaction of Y.H.'s statements about her cousins or a limiting instruction about those statements.

D. Trial counsel was not ineffective for failing to impeach Y.C. with her forensic interview.

1. Counsel did not perform deficiently.

Honig's final claim of ineffective assistance is that "[c]ounsel was ineffective for failing to introduce a prior inconsistent statement of one of the alleged victims," Y.C., "that differed significantly from her testimony at trial." Honig's brief at 17. The circuit court found that counsel did not perform deficiently because he had a valid strategic reason for not introducing Y.C.'s recorded forensic interview. The court explained:

> I also think that the prior inconsistent statement argument does not demonstrate a trial strategy that falls below the standard of care. [Trial counsel] testified today that he didn't find them that inconsistent, and I believe the State reads it that way as well. And my having reviewed Exhibit B [(57:Exhibit B)], I also agree with that.
>
> There are some things that are inconsistent. There are some that are consistent. So she's not as specific in the forensic interview, but she does talk about him pulling down her pants and that he was doing something to her but she can't say what. She had a lot of difficulty even in trial trying to figure out exactly what was happening and that, I think, went to her credibility. Certainly not uncommon for a very young child not to be able to indentify exactly what's happening to them in their vagina as they can't see them, you don't have a lot of experience with things interacting with that part of their body.

> So it was a valid trial strategy, I think, on [trial counsel's] part not to seek to admit that and then run the risk under [the] rule of completeness that the whole thing would come in.

(56:45-46; A-Ap. 148.)

Honig argues that "[c]ontrary to the circuit court's ruling, counsel did not offer a strategic reason for not presenting the video." Honig's brief at 18. Honig continues: "[trial counsel] said he did not even consider moving to introduce it. In hindsight, he said he believed the testimony was fairly consistent with the video, but the focus is the time of trial." *Id*.

Honig does not provide a record citation for his "hindsight" argument, but it is appears to be based on this testimony at the *Machner* hearing:

> Q . . . After [Y.C.] had testified in court, did you consider playing all or portions of her recorded interview in an attempt to attack her believability?
>
> A No. I think her testimony was fairly consistent with what she had said in the video.

(56:13-14; A-Ap. 115-16.)

Honig apparently believes that because trial counsel said "I think" rather than "I thought," it was only in hindsight that counsel concluded that Y.C.'s testimony was consistent with what she said in the video. If so, that is a strained reading of counsel's testimony. That is not how the circuit court understood it, and Honig does not assert that the circuit court's finding is clearly erroneous. *See Nielsen*, 247 Wis. 2d 466, ¶14.

Honig further argues that "[r]egardless of trial counsel's impression of the evidence, this Court should independently decide whether the video is inconsistent with Y.C.'s in-court testimony." Honig's brief at 18. The court should do that, he says, because the ultimate question of deficient performance is a question of law. *See id*.

Honig is correct when he says that the ultimate question of deficient performance is a question of law. *See Nielsen*, 247 Wis. 2d 466, ¶14. In some contexts, such as deciding whether a prior statement is inconsistent for purposes of the hearsay rule, inconsistency may present a question of law. *See State v. Prineas*, 2012 WI App 2, ¶18, 338 Wis. 2d 362, 809 N.W.2d 68. But in the context of evaluating deficient performance, the Supreme Court has held that "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington*, 562 U.S. at 105.

Determining whether a witness's prior statement is sufficiently inconsistent to warrant introduction of that statement is a matter of professional judgment. Honig has not shown that his lawyer's determination not to introduce Y.C.'s video statements as prior inconsistent statements "amounted to incompetence under 'prevailing professional norms.'" *Harrington*, 562 U.S. at 105 (quoting *Strickland,* 466 U.S. at 690).

2. Honig was not prejudiced.

Even if counsel had performed deficiently, Honig's claim fails because he has not demonstrated that he was prejudiced by the

failure to play Y.C.'s recorded statement to the jury. Had the recording been played, the jury would have heard Y.C. tell the interviewer:

> Nene [Y.H.] was sitting on the bed. Grandpa pulled down his pants then I was standing right by um um um nene. He pulled down my pants, he was doing something to me and I- I was doing something I was- I was nene was watching me he went to me that's right then he said and he gave me a kiss.

(57:Exhibit B:3); *see* Honig's brief at 19.[4] Y.C. also told the officer that Honig pulled Y.H.'s pants down (57:Exhibit B:4); *see* Honig's brief at 20.

Honig downplays the significance of those statements by arguing that Y.C. "said he took off her sister's pants, but this alone is not suspicious. Grandparents commonly help their children dress or undress." Honig's brief at 22. But Y.C. didn't just say that Honig pulled down Y.H.'s pants; she said that he pulled down *his* pants, and that he also "pulled down my pants, [and] he was doing something to me" (57:Exhibit B:3). The jury easily could have found *that* behavior suspicious. Any benefit that might have been derived from showing that Y.C.'s recorded interview omitted facts that she included in her trial testimony would have been offset by this additional damaging information.

Honig argues that playing the recorded interview would have allowed the jury to see that Y.C.'s demeanor was different in the video than at trial – that she was "talkative and upbeat" in the

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[4]Honig's brief quotes the third sentence of this paragraph as, "He go down my pants. . ." Honig's brief at 19. The transcript in the record indicates that she said, "He pulled down my pants. . ." (57:Exhibit B:3).

video and "tentative and quiet" in court. *See* Honig's brief at 23. But he does not explain how he was prejudiced by the jury's failure to see that. And it is hardly surprising that a four-year-old child would be frightened in a courtroom setting, facing a group of strangers. Indeed, Y.H. exhibited the same difference in demeanor. She, too, was "talkative and upbeat" in the recorded interview that the jury viewed (28:44-45; 63:Exhibit 1) but reticent in the courtroom (52:7-11).

Honig also argues that "the jury would have seen how Y.C. responded differently" to the open-ended questions asked in the forensic interview than she did to the more direct style of questioning in the courtroom. *See* Honig's brief at 23. Again, it is hardly surprising that a four-year-old would respond differently to open-ended questioning and would omit information that could elicited by more focused courtroom questioning.

It is implausible to suggest that a jury would hold a four-year-old child to a standard of consistency and completeness comparable to what it might expect of an older child or adult. Playing the video of Y.C. to demonstrate that she omitted information about which she testified at trial would do little to impeach her trial testimony while allowing the jury to hear additional inculpatory statements. Honig has not demonstrated that he was prejudiced by trial counsel's failure to play the video of Y.C.'s forensic interview.

Honig's final argument is that "[c]onsidering counsel's errors in the aggregate leads to the unavoidable conclusion that Mr. Honig was prejudiced." Honig's brief at 24. But, as discussed above, the only possible meritorious claim of

deficient performance relates to trial counsel's failure to seek redaction of Y.H.'s statements relating to her cousins. The circuit court observed that "given the fact that I only find this one issue to have any merit at all, there's nothing for me to aggregate" (56:48; A-Ap. 150). The court was correct. *See State v. Thiel*, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305 ("each act or omission must fall below an objective standard of reasonableness – in order to be included in the calculus for prejudice").

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 15th day of June, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,726 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of June, 2015.

_____
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